VIRGINIA LAW REGISTER

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The Bar Association vs. The Bar Examiners. Dissenting Opinion of the Editor in Chief.

"Consistency thou art a mewel," is the way in which the Cynic's Calendar quotes the well known adage. But at the risk of seeming akin to the obstinate animal, the Editor in Chief feels called upon to dissent from the opinion editorially expressed in the September number of the REGISTER entitled "The Recent Bar Examination," not only upon the ground of consistency but as well upon the ground that he does not agree with the conclusions stated in the editorial. To assure the public that there is really no lack of harmony in the staff of the REGISTER, it must be known that the said editorial was written whilst the Editor in Chief was disporting himself in the groves of "Blarney," where the celebrated stone threatened to go out of business if he remained there overnight. On reading it upon his return, he consulted his able and ever deferential associates, who assured him that he had the right to dissent.

He called their attention to a prior decision of the REGISTER to be found on page 323 of Volume XV in which unstinted praise was given to the methods of our Supreme Court of Appeals in conducting the examinations for candidates for admission to the Bar, and demanded a re-hearing on the principle of *stare decisis*; as well as upon the manifest error in the majority opinion. The rehearing was promptly refused, so nothing is left to him but this dissenting opinion. He adheres to the former opinion (which was prepared by himself) in spite of the able argument of Hughes, P. E. (Presiding Examiner or Executioner, as the case may be), to be found on page 394 of Volume XVIII of the REGISTER.

The first error in the majority opinion is in the statement that

the former method was "lax," and that the Court really passed every man who took the examination, "thus showing very conclusively a reprehensible laxity in examining the papers." We do not think a careful examination of the record will sustain this conclusion. On the contrary there was, we think, not a single examination held by the Court in which one or more unfortunates did not go down into utter darkness—i. e., were "pitched." Nor do we believe the Court was ever lax. We believe there was not a single applicant passed who did not evince enough knowledge of the law to give him the right to practice it, her do we believe in any rigid system of "marking."

Two things should be sought for; moral character first; second, such an acquaintance with the fundamental principles of pleading and general law as will evince the fact that the applicant knows enough to begin practicing with a fair knowledge of the great underlying principles and an ability sufficient to know how to use his knowledge. The argument that "practicing lawyers are not accustomed to answering legal questions without reference to the books" is a convincing argument that applicants for license ought not to be tested with "hard questions," such as would puzzle the ablest lawyer, unless those questions had the answers graded—not upon the principle of correctness, but upon the reasoning power shown in the answer, whether right or wrong. We always thought that a young applicant for a license showed a degree of wisdom which entitled him to his license when in answer to a very hard question as to what he should do in a given case, he replied, after a moment's hesitation, "I would go and consult some older lawyer." The argument as to what the medical profession or what other States do, has in our judgment, "nothing to do with the case." We believe Virginia had under the oldest system—which was practically a farce—one of the best bars in the Union. We believe the graduates in our law schools are as well qualified from an educational standpoint to practice law as any man who might even make a 100 mark on the examination for admission to the bar. We believe a fair part of the examination ought to be upon the ethics of the profession and to test the candidate upon his views as to whether the law is a "profession" or a "trade." We heartily agree with

Mr. Hughes that greater attention ought to be given to the character of the men applying for license; for after all the most dangerous reptile in any community is the well educated, learned and subtle lawyer without high character.

We believe the Board of Examiners—indeed, we know them—to be men of the highest sense of justice, fairness and right. If their system of marking is not too rigid and they allow their own good judgment upon the merits of each paper to pass upon the ability shown therein, no person can complain of the severity of the examinations. It is only when the "one tenth" and the "nth degree" is used as a measuring rod in grading, that the test becomes one Chinese in its character and where ability counts for nothing as against a good memory. For these reasons we respectfully dissent from the opinion of our associates and adhere to the opinion expressed in Volume XV, page 323.

The Recent Bar Examination.

In our editorial in the September number of the LAW REGISTER entitled "The Recent Bar Examination" we took our statistics as to the number who passed and those that failed from the *Richmond Times-Dispatch,* but as it has since been ascertained that those figures were erroneous, and likely to work an injustice to these institutions, we wish to rectify the error here. Washington and Lee "was not disappointed in seven degree men" for only six graduates from that institution failed. In the case of the University of Virginia our statement that a class of thirty-six took the examination and twelve failed was likewise erroneous. As a matter of fact twenty-nine men took the examination from the University of Virginia and only one degree man failed, and of the twenty-one undergraduates who stood the examination fourteen passed and one of them headed the list with nearly a perfect mark. In other words, not only did not twelve graduates from the University of Virginia fail, but the whole number of failures was only eight, of whom only one held a degree at last Finals. No doubt the investigation now being conducted by the committee appointed by Mr. Lile as president of the Bar Association will result in many changes

in the character of the next Bar Examination, and may even afford some balm in the feelings of the disappointed. It may be that injustice was done to some applicants at this last examination, and this may have resulted from the failure of all five members of the board to examine the papers of those that failed according to their rule (as would seem to be indicated by the fact that the result of the examination was known the *next day*), but the author of the above-mentioned editorial still adheres to his opinion expressed in the September number with regard to this examination, though his views do not meet with the approval of the Editor in Chief, and he trusts that the examiners will not allow clamor from the outside to intimidate them into lowering the standard of proficiency they have set.

Knowledge of the fact that Miss Lucy Goode White, the first woman in California to receive a judicial appointment, has failed to pass the Bar Examination, should at least afford some consolation to those that failed. We understand that Miss Lucy is bearing her disappointment with great fortitude, and we certainly have the right to demand as much from the sons of the mother state, even though Miss Lucy does turn out to be a militant suffragette. The LAW REGISTER extends its best wishes to the applicants for re-examination.

Legislation by Constitutional Amendments.

That our legislatures are not always aggregated masses of wisdom no one will asseverate, but that our constitution makers are Solomons no one will be rash enough to assert. The object of a constitution, its part and purpose in our system of government seems—along with many other ideas of our earlier statesmen—to have been absolutely lost sight of in the new theories that are being urged upon the people as panaceas for every political or social ill.

Constructive statesmanship with wise ideas of a well regulated system of checks and balances has given place to a mad desire to make changes and to attempt by the fundamental law to do that which should only be attempted by the Legislature. For one Legislature can correct the evil a former one has done, as

soon as the evil is ascertained. The mistake is not so serious in its effects. But an error in a constitution is one which it takes a long time to eradicate and it may become an eating sore before the knife of the surgeon can remove it.

Ohio seems to have caught the idea now in the air, that a constitution ought to be a mass of legislative enactments, and has adopted some thirty odd amendments to its fundamental law, as follows: The initiative and referendum in amending the constitution; the legislature empowered to enact laws limiting hours of labour, and excepting from the prohibition of other sections of the constitution the power to establish a minimum wage and sanitary regulations in factories; the legislature empowered to create a fund for the compensation of workmen for occupational diseases and industrial accidents; obstacles to the Torrens system of land title registration removed; reorganization of the judicial system so as to simplify appeals, hasten decisions and restrict the power of the Supreme Court to declare statutes unconstitutional; establishment of preferential primaries including those for Presidential candidates; enabling legislation to regulate insurance companies, including rates; compulsory civil service for all state, county and municipal offices; cities and towns empowered to own and operate utilities; enabling the legislature to permit a three-fourths verdict to govern in jury trials of civil cases; abolition of capital punishment. Women suffrage was defeated. It can be, we think, easily seen that very little discriminating judgment has been used in adopting these amendments. The litigation and trouble which will result may afford pleasure and profit to the legal profession in the state. Few others we believe will profit by it.

Careless Legislation.

Considering the time allowed our legislators to do their work, the wonder is that more pieces of careless legislation are not inflicted upon a helpless Commonwealth. But it does seem to us that a body of men in whose midst are found some very able lawyers ought not to allow laws to be made without due consideration of the evil to be prevented or the good to be

accomplished by each law. And surely when a law is passed upon a special subject, the general law bearing upon that subject ought to be considered in connection therewith, lest "confusion thrice confounded" be the result. In a very admirable desire to correct some of the evils in the service of process in divorce suits the last General Assembly passed the following act, p. 170 Session Acts 1912:

> "1. Be it enacted by the general assembly of Virginia, That when the defendant in a suit for divorce, either a vinculo matrimonii or mensa et thoro shall not be found within the jurisdiction of the State of Virginia, upon an affidavit therefor the court shall grant an order of publication against said non-resident, stating the object and grounds of the application, which shall be published as required by section three thousand two hundred and thirty of the Code of Virginia. And a copy of said publication shall be sent by mail by the clerk of the court in which said suit is pending, addressed to said non-resident defendant at his or her last known place of abode, which shall be specifically stated in the application for said order of publication, and the mailing of such copy shall be certified by the clerk to the court. No depositions in said cause shall be commenced until at least fifteen days shall have elapsed after the mailing aforesaid."

Two serious questions present themselves in considering this Act. First: Whether without direct words of repeal it has changed the effect of § 3230. This section provides that on affidavit "that a defendant is not a resident of this State" or that diligence has been used without effect to ascertain in what county, etc., he is, or that process directed to the officer of the county, etc., has been twice delivered, etc., and returned unexecuted, and in a *suit for a divorce* that the defendant is under sentence of confinement in the penitentiary, "an order of publication may be entered against such defendant." This order may be entered either by the court or clerk thereof in vacation.

The present act provides that when the defendant in a suit for a divorce *"shall not be found within the jurisdiction* of the State of Virginia, upon an affidavit therefor the *Court* shall grant an order of publication against said *non-resident,"* etc.

So it will be seen that the only affidavit now, upon which an order of publication in a divorce suit can be obtained is one stat-

ing that the defendant *"shall not be found within the jurisdiction of the State,"* and this order must be obtained from the Court—which of course means in term time. There are no words of repeal in the act. Now does it repeal by implication the general act as to orders of publication in divorce cases? It may do so as to the clause in regard to a defendant in the penitentiary, although we think this is doubtful in view of the well-settled rule that where a new remedy or mode of proceeding is authorized without an express repeal of a former one relating to the same matter it is to be regarded as merely cumulative, creating a concurrent remedy and not as abrogating the former mode of procedure. Raudebaugh *v.* Shelley, 6 Ohio St. 307. And the act referring only to defendants out of the jurisdiction of the State it could not be made to apply to a defendant in the penitentiary.

It certainly does repeal the old act concerning orders of publication in divorce suits as far as non-residents are concerned, for it is evidently intended to prescribe the only rule which should govern the case provided for, which must be construed as repealing the one as to divorce suits against non-residents. Roche *v.* Mayor, etc., 40 N. J. Law 257.

That the act was carelessly drawn is evident. It makes the fact that defendant cannot be found within the jurisdiction of the State the sole ground upon which the affidavit can be made, and yet says later on "the Court shall grant an order of publication against *'said non-resident,'* and shall mail a copy addressed to said *non-resident," etc.* What non-resident? A man may not be found within the jurisdiction of the state and yet not be a non-resident.

The second question is as to the criterion by which any one can safely make such an affidavit. Will the affiant have to search the whole state? A legally non-resident defendant might be somewhere in the confines of the state and an affiant might know such to be the case and yet know it would be impossible to get process served upon him personally. Section 3230 allowing process to be delivered twice to an officer more than ten days before a return day and returned not executed, would have availed in such a case, but this is no longer possible. The only remedy is for the affiant to swear to the *best* of his *knowledge, informa-*

tion and belief that the defendant is not within the jurisdiction of the state. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 281, 24 S. E. 1016. Any one can make this affidavit for the affiant who can have knowledge of the facts contained in the affidavit. Benn *v.* Hatcher, 81 Va. 25. But suppose the affiant has no knowledge on the subject; is his information and belief sufficient?

Another question arises as to the mailing of a copy of the order of process addressed to said "non-resident defendant at his or her last known place of abode." Suppose the defendant never was a "non-resident" but had simply disappeared. What is to be done in that case? "A" lived in Richmond in 1904, disappeared in that year; was last heard of in Lynchburg in 1905. What remedy has "B," his deserted wife? She can only swear he cannot be found within the jurisdiction, and was last heard of in Lynchburg. Can the court or clerk thereupon solemnly determine that "A" is a non-resident. "A" may be at that time residing in Staunton. Can a divorce obtained under these circumstances be valid and binding?

The fact is that this act as drawn is confused, confusing and must await judicial determination to allow any one to determine its true construction. Had a little more care and skill been used in draughting it, there could be but little objection to the provision requiring the affidavit to be made "in court." Too much care cannot be required in divorce proceedings. But this act is paradoxical in being so carelessly drawn as to render any one proceeding under its terms

"Weary, fu' o' care."

Reform in Judicial Procedure.

That an absolute and radical change in our methods of judicial procedure is inevitable, the blindest of us can readily see. Party platforms are incorporating it as a pet measure. Demagogues are shouting for it; the men least qualified to carry it out are trying to get a chance at it. As noted in our last number, the Supreme Court of the United States is at work on a system for the Federal Courts. The American Bar

Association at its last meeting on the motion of a Virginia lawyer, Thomas W. Shelton, took the following action:

> Whereas, Section 914 of the Revised Statutes has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases; and
>
> "Whereas, It is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court;
>
> "Now, therefore, be it and it is hereby resolved:
>
> "First: That a complete uniform system of law pleading should prevail in the federal and state courts;
>
> "Second: That a system for use in the federal courts, and as a model, with all necessary rules of practice or provisions therefor, should be prepared and put into effect by the Supreme Court of the United States;
>
> "Third: That to this end, Sec. 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted;
>
> "Fourth: That for the purpose of presenting these resolutions to Congress and otherwise advocating the same in every legitimate manner, there shall be appointed a committee of five members to be selected by the President to be known as 'The Committee on Uniform Judicial Procedure.'"

The Executive Committee of the Association did not accompany its reference with instructions, but assumed that the only purpose of the reference was to determine whether, in the opinion of the committee, Mr. Shelton's resolution should be recommended for adoption. The committee said:

> "The subject-matter of the resolution is one of great importance. It is true that Section 914 of the Revised Statutes has failed to bring about any uniformity in proceedings in civil cases. It is true that uniformity in this respect is most desirable; and the inference drawn from the resolutions seems to your committee justifiable, namely: That if a complete uniform system of law pleading and procedure should prevail in the federal courts—a system carefully modeled by the Supreme Court of the United States—it would in time induce the several states to adapt their own systems of pleading to such model.
>
> "Mr. Shelton's resolution could with propriety be referred to the Committee of Fifteen, already in existence, and whose

special work would include the work outlined by the proponent. But this particular work could probably be accomplished through the efforts of a smaller committee having one object in view, and enthusiastically alert to accomplish it.

"We therefore recommend to the Association the adoption of Mr. Shelton's resolution."

And at its last annual meeting the Virginia State Bar Association passed the following resolution:

Whereas, It is important that Virginia should take a positive stand with reference to the present active propaganda looking to the reform of pleading and procedure and that a report, together with all such recommendations as may appeal to the Committee as pertinent, be made to the next annual meeting of this Association,

Be it resolved, That the President elect of this Association be, and he is hereby authorized to appoint a Committee to be composed of five members of this Association to be known as the "Committee on Reform of Judicial Procedure," the duties of which shall be:

First, To report, as far as practicable, to this Association at its next annual meeting, the history of such reforms as have been put into effect in other States and as are being considered by the American Bar Association and the various State Bar Associations and to make recommendations regarding the same:

Second, To make specific recommendations with reference to the present system of pleading and procedure in effect in the State of Virginia, looking to the improvement thereof.

Whether the dignified and slow moving Virginia Bar Association means to "get busy" at last is a question, but if any one can move that body, Shelton will. His heart and soul are in the matter. Unlike some other reformers (modesty forbids a more definite description) he is willing to work, as well as talk and write. If he only would consent to go to the next Legislature that body might be induced to pass one or two salutary acts on the subject and might not be frightened at the direful and tragic effect which the remedy by motion for torts would have upon those now happily and safely sheltered under the provisions of § 3215, if that section was no longer excepted from the action of the Statute.